

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

AMERICAN EMPLOYERS' INSURANCE
COMPANY, as subrogee of College Book
Stores of America
One Beacon Street
Boston, MA 02108

Plaintiff,

v.

T.A. RIETDORF & SONS, INC.
P.O. Box 1528
Wilmington, DE 19899

Defendant.

Civil Action No. 05-63

JURY TRIAL DEMANDED

MOTION TO DISMISS

COMES NOW, T.A. Rietdorf & Sons, Inc. (hereinafter "Rietdorf") by and through its undersigned counsel and hereby moves this Honorable Court to dismiss this action against it pursuant to Fed. R. Civ. P 12(b)(6). In support of its Motion, Rietdorf asserts the following:

1. On March 26, 2004, Plaintiff American Employers' Insurance Co. (hereinafter "American") filed an Amended Complaint against SPX Corporation, et. al. (hereinafter "Defendants") as subrogee of College Book Stores of America (hereinafter "College Book Stores"). American insured the property of College Book Stores located at Widener University in Wilmington, Delaware. This property was damaged as a result of a fire on March 29, 2002. American seeks reimbursement of the amount it paid College Book Stores pursuant to its insurance policy.

2. On June 18, 2004, Defendants filed a Third Party Complaint against Rietdorf alleging that Rietdorf was solely liable to American or jointly and severally liable with the Defendants or liable to

the Defendants for indemnification and/or contribution for the cause of action set forth in American's Amended Complaint.

3. Thereafter, on February 4, 2005, American filed the cause of action which is the subject matter of this Motion to Dismiss. In this cause of action, American alleges that Rietdorf is responsible for the amount American paid pursuant to its insurance policy with College Book Stores.

4. The purpose of a motion to dismiss under Rule 12(b)(6) is to test the sufficiency of the complaint. McConnell v. Applied Performance Technologies, 2002 WL 483540 (S.D. Ohio). "This rule permits courts to dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery." Id. at *2.

5. American's Complaint should be dismissed because it should have amended its complaint in the original action pursuant to Rule 14(a). In the alternative, American's claim against Rietdorf is a compulsory counterclaim and should have been filed pursuant to Rule 13(a) in the original action. Rietdorf's discussion in support of these arguments is set forth in its Memorandum of Law in Support of its Motion to Dismiss, which is attached hereto.

WHEREFORE, Defendant T.A. Rietdorf & Sons, Inc. respectfully requests that this Honorable Court grant its Motion to Dismiss Plaintiff American Employers' Insurance Co.'s Complaint pursuant to Rule 12(b)(6).

CHRISSINGER & BAUMBERGER

/s/ David L. Baumberger

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DATED: May 12, 2005